STATE OF MICHIGAN

COURT OF APPEALS

PHILLIP I. VENABLE,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
April 20, 2001

No. 219037
Genesee Circuit Court
LC No. 97-059552-CL

Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting summary disposition in favor of defendant. We affirm.

Plaintiff, a sixty-one-year-old Caucasian male, was discharged from his employment with defendant in 1996 after approximately thirty-one years of service. At the time of his discharge, plaintiff held the position of a sixth-level supervisor in defendant's Service Parts Organization (SPO) plant in Swartz Creek. In August 1996 defendant received a phone call from an anonymous individual on its "Awareline," a confidential toll-free number defendant's employees used to report suspected misconduct. The caller alleged that plaintiff had been observed leaving the SPO facility on company time with hourly employees and drinking at a nearby bar. Subsequent surveillance by defendant confirmed the caller's allegations, and plaintiff was discharged. Plaintiff's termination in October 1996 followed a meeting for all sixth-level supervisors held in the spring of 1996, where management personnel warned employees that they would be immediately discharged if they knowingly allowed an employee to leave the plant while on company time.

After his employment with defendant was terminated, plaintiff commenced the instant action alleging race, gender and age discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, wrongful discharge and fraudulent misrepresentation. After defendant moved for summary disposition under MCR 2.116(C)(10), the trial court summarily disposed of all of plaintiff's claims.

We review a trial court's grant of summary disposition de novo. *Asset Acceptance Corp v Robinson*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 215158, issued 3/2/01), slip op 1.

A motion brought under MCR 2.116 (C)(10) tests whether there is factual support for a claim. *Burden v Elias Big Boy Restaurants*, 240 Mich App 723, 725-726; 613 NW2d 378 (2000).

> In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).]

Plaintiff first asserts that the trial court erred in granting summary disposition of his discrimination claims. We disagree. Plaintiff's discrimination claims are based on section 202 of the Civil Rights Act (CRA), which prohibits discharge from employment on the basis of race, gender and age. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). A review of the complaint demonstrates that plaintiff's age, race, and gender discrimination claims are premised on a "disparate treatment" theory. In *Int'l Brotherhood of Teamsters v United States*, 431 US 324, 335 n 15; 97 S Ct 1843; 52 L Ed 2d 396 (1976), the United States Supreme Court explained the concept of "disparate treatment."

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. [*Id*. (internal quotations and citations omitted).]

To make out a prima facie case of disparate treatment, plaintiff must be a member of a protected class, and must present sufficient evidence "to permit a reasonable juror to find that *for the same or similar conduct* [he] was treated differently from a *similarly situated* [younger, female, minority] employee." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 181; 579 NW2d 906 (1998), citing *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994) (emphasis supplied); see also *Merillat v Michigan State Univ*, 207 Mich App 240, 247; 523 NW2d 802 (1994); *Manning v Hazel Park*, 202 Mich App 685, 697; 509 NW2d 874 (1993).

On appeal, plaintiff maintains that defendant's discriminatory intent can be inferred from its failure to discharge similarly situated (1) minority, (2) younger, (3) female, sixth-level supervisors at the SPO facility plant who engaged in the same or similar misconduct as plaintiff. In support of his claim, plaintiff points to specific instances involving three fellow sixth-level supervisors at the SPO plant.

First, plaintiff points to an incident involving a younger sixth-level supervisor at the SPO facility who was reprimanded in the spring of 1996 after allowing his hourly employees to leave the plant one-half hour early while still clocked in on company time. This incident precipitated a

meeting where management personnel warned all of the sixth-level supervisors that they would be immediately discharged without warning for similar behavior.

Plaintiff also points to an incident involving a younger, male, African-American sixth-level supervisor who plaintiff claims showed up late to work and left early but was not discharged. Plaintiff also points to allegations that a female African-American supervisor fell asleep on the job, and was therefore not supervising her hourly employees. Defendant does not dispute that these sixth-level supervisors engaged in misconduct, or that they were not discharged for their behavior. Rather, defendant asserts that discriminatory intent on the part of defendant cannot be inferred under these circumstances because plaintiff's fellow sixth-level supervisors were not similarly situated to plaintiff, and did not engage in the same or similar misconduct.

To demonstrate that he was similarly situated to the other sixth-level supervisors, plaintiff is required to show "that all of the relevant aspects" of their employment were "nearly identical" to plaintiff's. *Smith v Goodwill Services of West Michigan, Inc*, 243 Mich App 438, 449; ___ NW2d ___ (2000), quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997) (Brickley, J.), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994) (internal quotations omitted); *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (CA 6, 1998).

Further, the Sixth Circuit Court of Appeals has articulated the requirements a plaintiff must meet to demonstrate that other employees are similarly situated in the context of disparate disciplinary decisions.

> [T]he individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct *without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it*. [*Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992), citing *Mazzella v RCA Global Communications, Inc*, 642 F Supp 1531 (SDNY, 1986), aff'd 814 F2d 653 (CA 2, 1987); *Lanear v Safeway Grocery*, 843 F2d 298 (CA 8, 1988) (emphasis supplied).]

Similarly, when determining whether the other sixth-level supervisors were engaged in the same or similar misconduct as plaintiff, the reasoning of the United States Supreme Court in *McDonald v Santa Fe Trail Transportation Co*, 427 US 273, 283 n 11; 96 S Ct 2574; 49 L Ed 2d 493 (1976) is instructive.

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employees misconduct as grounds for terminating him was merely a pretext. [*Id.*, quoting *McDonnell Douglas Corp v Green*, 411 US 792, 804; 93 S Ct 1817; 36 L Ed 2d 668 (1973) (emphasis and ellipses in original) (internal quotations omitted).]

See also *Hollins v Atlantic Co, Inc*, 188 F3d 652, 659 (CA 6, 1999); *Equal Employment Opportunity Comm v EJ Sacco, Inc*, 102 F Supp2d 382, 387 (ED Mich, 1999).

In our opinion, plaintiff was not similarly situated to his fellow supervisors because his misconduct can be differentiated from that of the other supervisors. For instance, plaintiff was observed by private investigators conversing with an hourly employee at a bar outside the SPO facility at a time when the employee was still clocked in on company time. Additionally, plaintiff, despite receiving warnings from management the previous spring regarding the seriousness of allowing an employee to leave the plant while still clocked in, failed to subsequently correct the employee's time card. Another significant differentiating circumstance is that plaintiff was previously reprimanded by his general supervisor in 1995 for inappropriate threatening behavior involving his hourly employees.

Moreover, although plaintiff is not required to show precise equivalence in culpability between his misconduct and that of the other supervisors, the record reflects that the other supervisor's acts, although inappropriate, were not of "comparable seriousness to [plaintiff's] . . . own infraction." *Mitchell, supra* at 583 n 5. Though allowing employees to leave one-half hour early, falling asleep on the job, and arriving late and leaving early are no doubt instances of misconduct; in our view they do not rise to a level of comparable seriousness to plaintiff's act, particularly when plaintiff's misconduct occurred after the sixth-level supervisors were warned of the serious disciplinary implications of engaging in time-clock fraud.

Defendant also argues that the trial court's grant of summary disposition was proper because plaintiff, a Caucasian male, failed to present a prima facie case of reverse discrimination. As a preliminary matter, plaintiff argues that he is not required to satisfy the burden-shifting framework articulated by this Court in *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997), because he has presented direct evidence of discrimination. Plaintiff's interpretation of the prevailing law regarding employment-discrimination cases is sound. It is well-settled that where a plaintiff presents direct evidence of unlawful discrimination, the *McDonnell Douglas*[1] burden shifting framework does not apply. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; __ NW2d ___ (2001); *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 235; 581 NW2d 746 (1998).

Here, plaintiff argues that allegations made during his deposition that African-American females received favorable treatment by defendant amounts to direct evidence. We disagree. "Direct evidence" is "evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the adverse employment decision." *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997), quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327 (WD Mich, 1997). In our view, plaintiff's bare allegations that African-American women received favorable treatment from defendant, would not, if believed by the trier of fact, automatically warrant the conclusion that unlawful discrimination

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[1] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

motivated in any way defendant's decision to discharge plaintiff. Consequently, the burden-shifting framework is applicable to plaintiff's claim.

In *Allen, supra*, the Court adopted the heightened *McDonnell Douglas* standard employed by the Sixth Circuit when evaluating reverse discrimination claims. To establish a prima facie claim of reverse discrimination, a plaintiff must demonstrate:

> (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against [Caucasian] men; (ii) that the plaintiff. . . was qualified for [the position]; (iii) that, despite plaintiff's qualifications, [he was discharged]; and (iv) that a female, [minority] employee of similar qualifications [was not discharged]. [*Allen, supra* at 433 (footnote omitted).]

With the foregoing principles in mind, we conclude that plaintiff has failed to set forth background circumstances that suggest defendant is the unusual employer who discriminates against Caucasian men. *Id.* For example, plaintiff has not presented evidence that he possessed superior qualifications to those supervisors who were not discharged, which would establish the requisite suspicious circumstances in a reverse discrimination claim. See *Herendeen v Michigan State Police*, 39 F Supp2d 899, 908 (WD Mich, 1999); *Harding v Grey*, 9 F3d 150, 154 (CA DC, 1993). Nor has plaintiff presented evidence that suggests a pattern of disproportionate hiring practices favoring minorities over Caucasians. *Mills v Health Care Service Corp*, 171 F3d 450, 457 n 2 (CA 7, 1999); see also *Allen, supra* at 434 n 6 and cases cited therein.[2] Viewing the record evidence in the light most favorable to plaintiff, we conclude that plaintiff has failed to present sufficient evidence on which a reasonable trier of fact could conclude that he received disparate treatment on the basis of his race, age, or gender.

Plaintiff next argues that the trial court's grant of summary disposition regarding his wrongful discharge claim was erroneous where genuine factual disputes existed with regard to whether plaintiff's employment relationship with defendant was terminable only for cause. We disagree.

Under Michigan law, "employment relationships are terminable at the will of either party." *Lytle, supra* at 163, citing *Lynas v Maxwell Farms*, 279 Mich 684, 687; 273 NW2d 315

[2] Raising the issue for the first time in his reply brief on appeal, plaintiff argues that the heightened standard articulated in *Allen, supra*, violates equal protection guarantees because it imposes a more onerous standard on non-minority individuals. Ordinarily, this Court will not review issues raised for the first time on appeal. *Booth Newspapers v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). In light of our conclusion that plaintiff's disparate treatment claim is factually deficient, we decline to consider plaintiff's equal protection claim. This Court may properly decline to consider constitutional issues where an appeal may be resolved on nonconstitutional grounds. *Widdoes v Detroit Public Schools*, 242 Mich App 403, 408 n 4; 619 NW2d 12 (2000).

(1937). In other words, employment can be terminated at any time, by either party, even for arbitrary and capricious reasons. *Bracco v Michigan Technological University*, 231 Mich App 578, 598; 588 NW2d 467 (1998). However, in *Toussaint v Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 598; 292 NW2d 880 (1980), our Supreme Court recognized that the presumption of employment at will may be rebutted, and contractual obligations and limitations may be imposed on an employer's right to terminate employment at will. *Lytle, supra* at 164.

Under certain circumstances, an employer's statements to an employee may create an employment contract terminable only for cause. *Rowe v Montgomery Ward Co*, 437 Mich 627, 638-639; 473 NW2d 268 (1991). The thrust of plaintiff's argument on appeal is that statements allegedly made by defendant's personnel director in 1965 could lead a reasonable factfinder to "find a promise of job security implied in fact." *Id.* at 639. Plaintiff has presented evidence by way of affidavit in which he alleges that, on leaving the collective bargaining unit in 1965 to accept a supervisory position with defendant, he was told he would have the same job security rights as a supervisor that he did while in the bargaining unit. Plaintiff further alleges in his affidavit that he was told the same disciplinary procedures would apply to him, and that he was never told that he could be terminated without cause.

Defendant argues that triable issues do not exist with regard to whether plaintiff could be terminated only for cause because plaintiff subsequently signed numerous compensation statements that clearly provide that plaintiff's employment relationship with defendant was terminable at will. According to defendant, plaintiff is also precluded from arguing that he believed his employment to be terminable only for cause because he received defendant's employee manual which provides that employment relationships with defendant are either on a month-to-month or day-to-day basis. Defendant finds support for its argument in decisions of this Court holding that an employee may not harbor a legitimate expectation of just-cause employment where he or she receives these materials. See *Schultes v Naylor*, 195 Mich App 640, 644; 491 NW2d 240 (1992); *Singal v General Motors Corp*, 179 Mich App 497, 505; 447 NW2d 152 (1989).

Plaintiff attempts to distinguish the instant case from *Singal, supra* and *Schultes, supra*, arguing that they are inapplicable because he has presented evidence of oral statements by defendant's agent justifying his expectation of employment terminable only for cause. In our view, plaintiff's assertion is without merit because he has not presented evidence of clear and unequivocal statements on the part of defendant manifesting an intention to be bound to a contract for just-cause employment.

To overcome the presumption that his employment was terminable at will, the statements plaintiff claims manifest defendant's intent to create a contract for employment terminable only for cause must be "clear and unequivocal." *Rowe, supra* at 645; *Lytle, supra* at 640-641. When evaluating these claimed assurances, we consider "all relevant circumstances, including other written and oral statements and other conduct manifesting intent." *Id.*, quoting *Rowe, supra*. In other words, the statements must clearly reflect defendant's intention to form a contract for permanent employment. *Rowe, supra* at 645. Plaintiff's mere subjective expectations are not enough to create an employment relationship terminable for cause; there must be *mutual* assent to a just-cause provision pursuant to an objective standard. *Bracco, supra* at 601 (emphasis in

original). Nor will this Court "lightly infer" a finding of a policy of discharge only for cause. *Id.* at 599, citing *Rood v General Dynamics Corp*, 444 Mich 107, 136-137; 507 NW2d 591 (1993).

In our view, the statements plaintiff claims support his legitimate expectation of employment terminable for cause were neither clear nor unequivocal to the extent that they may overcome the presumption of employment terminable at will. Although plaintiff alleged that he was told that he would retain the same job security rights as a manager that he did as a union member, plaintiff does not assert that these statements were made in response to "articulated concerns that he be terminated for just-cause only." *Barber v SMH (US), Inc*, 202 Mich App 366, 371; 509 NW2d 791 (1993). Further, there is no indication in the record that the statements were made in the context of job negotiations. *Lytle*, *supra* at 172. In our view, the record simply does not contain objective evidence of statements "reasonably capable of instilling [in plaintiff] a legitimate expectation of just-cause employment." *Bracco*, *supra* at 599.

Finally, plaintiff contends that the trial court erred in granting summary disposition of his claim of fraudulent misrepresentation. We disagree. To maintain an action for fraudulent misrepresentation, plaintiff must satisfy the following elements:

> (1) [T]hat the defendant made a material representation; (2) that it was false; (3) that when [the defendant] made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Chandler v Heighho*, 208 Mich 115, 121; 175 NW2d 141 (1919).]

Defendant argues that plaintiff's claim of fraudulent misrepresentation is deficient because plaintiff has not demonstrated that defendant made a "material representation." As defendant correctly points out, "[a] promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998) (footnote and citations omitted); see also *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 443-444; 505 NW2d 275 (1993). Because the statements plaintiff points to as evidence of a material misrepresentation relate to an alleged future promise of employment terminable only for cause, they are not actionable in a claim for fraudulent misrepresentation. *Forge*, *supra* at 212.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder